92-1354

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID B. DEUTSCH,
Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit
No. 91-2629

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit improperly approve the enlargement by the District Court of the respondent's motion for summary judgment in violation of subdivision (b)(1) of Rule 7 of the Federal Rules of Civil Procedure to the prejudice of the petitioner and in direct contravention of the plain meaning of the Rule and the decisions of the other circuits?

2. Did the Seventh Circuit sanction the unwarranted violation of petitioner's Fifth Amendment right to due process by approving a procedure which was fundamentally unfair to the petitioner in violation of the precedents of this Court?

3. Did the Seventh Circuit improperly fail to review all of the evidence pertaining to the issues presented by respondent's motion for summary judgment as the direct result of the intentional withholding of evidence by the respondent and contrary to representations made by the respondent in signed pleadings filed within the District Court in contravention of the precedents of this Court and the other Circuits?

LISTING OF ALL PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption of this case.

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REFERENCE TO OPINION OF SEVENTH CIRCUIT

The case number of the opinion of the Seventh Circuit in this case is 91-2629. Initially the order and opinion were not to be published. However, as the result of an ex parte request by the respondent, the opinion was published on January 12, 1993. It has not yet been officially published with a citation.

CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

This cause of action filed within the District Court was an action for personal injuries under the Federal Employers' Liabil-

ity Act. The District Court had concurrent original jurisdiction for the action pursuant to 45 U.S.C. section 56. The District Court entered its order granting the respondent summary judgment in its favor on June 12, 1991. The petitioner filed his Rule 59 Motion on June 26, 1991. That motion was denied by the District Court on July 9, 1991. The notice of appeal was filed by the petitioner on July 12, 1991.

Jurisdiction of the appeal was properly placed in United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. Section 1291 since this was an appeal from a final judgment of the United States District Court of Illinois, Northern District, Eastern Division. The Court rendered its unpublished order on September 21, 1992 affirming the District Court. A petition for rehearing (in banc) was filed by petitioner on October 7, 1992, pursuant to an order of that date allowing the filing instanter. On October 28, 1992, the petition for rehearing was denied. The petition for a writ of certiorari was initially filed with this Court in a timely fashion on January 19, 1993, but was rejected by the Clerk's office because it was typewritten and not printed.

The statutory provision which confers jurisdiction on this Court of the judgment of the Seventh Circuit Court of Appeals in question by writ of certiorari is 28 U.S.C., section 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF CIVIL PROCEDURE

Amendment V, United States Constitution

> "No person shall...be deprived of life, liberty, or property, without due process of law. . . ."

Rule 7(b)(1) Federal Rules of Civil Procedure

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds

therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

STATEMENT OF THE CASE

The petitioner filed his Complaint in the Northern District, Eastern Division, of the United States District Court of Illinois on November 5, 1990 (R. 1-1). He brought his action under the Federal Employers' Liability Act (FELA) for injuries he had sustained during the course of his employment with the respondent, Burlington Northern Railroad Company, on November 11, 1987 at Rochelle, Illinois (R. 1-1). The Complaint of the petitioner made three separate allegations of negligence against the respondent:

(a) failure to provide a reasonably safe place to work;

(b) failure to provide a reasonably safe ladder free of foreign substances, and

(c) failure to equip the rungs of the ladder of the box car with non-skid metal surfaces (R. 1-1).

Petitioner's deposition which was a part of the record demonstrated that he was involved in switching some cars and the crew had kicked one car into the track he was working (R. 28, p. 67). His job was to board the moving car, climb up the ladder on that car, secure the hand brake by turning it so that the car would stop rolling, and then get off the car before other cars would roll into it (R. 28, pp. 66, 67). The petitioner criticized the location of the handbrake on top of the car (R. 28, p. 67). The petitioner had to mount that car while it was moving, ride it to where he wanted it, and then stop the car (R. 28, p. 67). He had to hurry up the ladder to get the car stopped at the proper location (R. 28, pp. 68, 69). After setting the handbrake, the petitioner had to get down the ladder and off the car before the other cars ran into the anchor car (R. 28, p. 67). He had to couple air hoses and make sure the

other cars did not roll back (R. 28, p. 76). As he started back down the ladder, he slipped at approximately three-quarters of the way down (R. 28, pp. 76, 77). His right leg became caught in the ladder after he dropped six to eight feet (R. 28, p. 78). He did not go back and inspect the rung for grease or frost (R. 28, p. 80). The petitioner ultimately required surgery to his neck by Dr. Skaletsky (R. 28, p. 109).

The District Court granted respondent an extension up to May 22, 1991 to file dispositive motions (R. 3, 4). The respondent filed its motion for summary judgment and sought relief for the sole reason that there was no basis of negligence on the part of the respondent as the result of the alleged presence of frost on the ladder (App. 24, 26).

On June 5, 1991, the petitioner filed his memorandum and response and pointed out to the District Court that there were three allegations of negligence in the Complaint of the petitioner and that the motion of the respondent should be denied on the two points not covered by the motion (App. 32,33). The petitioner specifically pointed out deposition testimony that demonstrated a basis of liability under the failure to provide a safe place to work due to the unusual location of the handbrake at the top of the box car (App. 32). The parties appeared for argument on the motion on June 11, 1991, but no argument was afforded by the District Court. The respondent filed its reply on June 11, 1991 and made an argument as to the other allegations of negligence within the Complaint of the petitioner for the first time (App. 34). There was no opportunity for the petitioner to make any response to respondent's Reply which was received by the lead counsel by mail on June 13, 1991. Respondent also applied for and received leave to file the "entire" deposition of the petitioner and represented to the District Court and petitioner that respondent had done that (R. 5, 26). It was not until October 27, 1992, that one of petitioner's attorneys discovered that respondent had not filed deposition exhibit two which was a concise statement of the

petitioner relative to the occurrence which had been taken by the respondent's claims representative (App. 40, 41).

The District Court granted respondent summary judgment on all issues on June 12, 1991 and entered judgment in respondent's favor (App. 1). The petitioner filed his Rule 59 motions and memorandum on June 26, 1991 (R. 33). An affidavit of petitioner was filed which repeated the contents of petitioner's deposition and statement relative to his allegation that the method of performing the work was unsafe because of the extra climbing he had to do as the result of the unusual location of the handbrake at the top of the car and having to go down the ladder quickly before the other cars were rolled into the anchor car that he was on (R. 33).

The District Court entered its order denying petitioner's Rule 59 motions on July 9, 1991 (R. 36). The petitioner thereafter filed his notice of appeal on July 12, 1991 (R. 37). The petitioner also filed his notice with the District Court requesting that the record on appeal be supplemented by the filing of the entire deposition of the plaintiff (R. 39).

The appeal was argued before the Seventh Circuit on April 6, 1992 (App. 11). The case was decided through an unpublished order and opinion on September 21, 1992 (App. 11). From a review of the opinion, it was apparent that the Court had overlooked deposition exhibit two, petitioner's statement. This oversight was called to the attention of the Seventh Circuit in the petition for rehearing which was denied on October 28, 1992 (App. 19).

ARGUMENT

I. THE DISTRICT COURT VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS BY ENLARGING THE MOTION FOR SUMMARY JUDGMENT OF RESPONDENT IN VIOLATION OF RULE 7(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND FOR ADOPTING A PROCEDURE WHICH WAS FUNDAMENTALLY UNFAIR TO THE PETITIONER. THE SEVENTH CIRCUIT SANCTIONED THIS RADICAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL OUT FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The District Court entered an order in this case that all dispositive motions had to be filed by May 22, 1991 (R. 4). In the motion for summary judgment filed by the respondent by that date, the railroad had only one basis of attack — there was no negligence on the part of the respondent as the result of the alleged presence of frost on the ladder (App. 24, 25). The petitioner did not disagree with the position of the respondent on that one point but went on to point out that the petitioner, in his deposition, had complained about the unusual location of the handbrake on the box car which made the work unreasonably unsafe (App. 32). The petitioner went on to explain that there were two additional allegations in his Complaint which were not addressed in any way in the motion for summary judgment of the respondent: the failure to provide the petitioner a reasonably safe place to work and the failure to equip the rungs of the ladder of the box car with non-skid metal surfaces (App. 32, 33). When the petitioner pointed out the defects within the motion as an absolute bar to the relief sought by respondent's motion, the District Court allowed the respondent to amend its motion through a memorandum filed on June 11, 1991 (App. 34), long after the deadline for dispositive motions had passed. In addi-

tion, the petitioner was afforded no opportunity for oral argument or written response and the District Court entered its order on the following day (App. 1). Petitioner's lead attorney received the amendment after the order had been entered.

Subdivision (b)(1) of Rule 7 of the Federal Rules of Civil Procedure requires that motions "shall state with particularity the grounds thereof." This requirement was held to be "real and substantial" and not a mere technical requirement. *United States v. Krasnov*, 143 F.Supp. 184, 196 (E.D. Pa. 1956), *aff'd* 355 U.S. 5, 78 S. Ct. 34 (1957). Any motion "seeking an effective dismissal...must be pleaded with particularity." *Dunbar v. Triangle Lumber and Supply Company*, 816 F.2d 126, 129 (3d Cir. 1987). A motion for summary judgment must be denied when it does not clearly specify the bases of attack. *Raitt v. Seltzer*, 10 F.R.D. 48 (D.C.N.Y. 1950).

The various federal circuits have strictly enforced Rule 7(b)(1). *Morgan v. McDonough*, 689 F.2d 265, 279 (1st Cir. 1982); *Wolgin v. Simon*, 722 F.2d 389, 394-95 (8th Cir. 1983). The Seventh Circuit has previously refused to allow amendments beyond the time for filing motions, as in the present case, to satisfy the particularity requirement. *Martinez v. Trainor*, 556 F.2d 818, 819-20 (7th Cir. 1977). The dangers of lax observance of the rule were clearly enumerated by the Fifth Circuit in *Davis v. Hall Engineering, Inc.*, 549 F.2d 314, 325 (5th Cir. 1977).

> "Without the particularity requirement district courts would be subject to reversal for rulings on which they did not have the benefit of contrary argument, and opposing parties would suffer rulings against their interests without notice of opposing contentions."

The District Court was clearly without authority to enlarge a motion which was defective under Rule 7(b)(1) through a memorandum filed after the deadline for dispositive motions and without affording the petitioner any opportunity to be heard. The

essence of due process is fundamental fairness. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 24, 101 S.Ct. 2153 (1981).

Due process is flexible and calls for such procedural protections as the particular situation demands. *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980), *cert. denied*, 425 U.S. 914, 96 S. Ct. 1511 (1981). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985); *Patterson v. Coughlin*, 761 F.2d 886, 890 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879 (1986). The conduct of the District Court precluded the petitioner of any opportunity to respond to the new arguments and have his case fairly judged on the merits as required by *Okeson v. Tolley School District No. 25*, 760 F.2d 864, 868 (8th Cir. 1985), *rev'd on other grounds*, 766 F.2d 378 (8th Cir. 1985). The acts of the District Court as sanctioned by the Seventh Circuit constituted a gross failure to observe the fundamental fairness essential to the very concept of justice. *Miller v. State of North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). The petitioner raised the deprivation of essential constitutional rights before the District Court in his Rule 59 motions (R. 33) and the Seventh Circuit within his initial brief.

The District Court violated Rule 7(b)(1) and its own order pertaining to the filing of dispositive motions. The petitioner was further prejudiced by the trial court by being deprived of any meaningful opportunity to respond to the untimely and improper amendments to the motion for summary judgment. The District Court clearly violated petitioner's right to procedural due process as guaranteed by the Fifth Amendment to the United States Constitution. The sanctioning of this serious deviation of the usual and acceptable course of judicial proceedings by the Seventh Circuit calls out for the exercise of this Honorable Court's power of supervision.

II. BOTH THE DISTRICT COURT AND THE SEVENTH CIRCUIT FAILED TO AFFORD THE PETITIONER THE TYPE OF REVIEW TO WHICH HE WAS ENTITLED AS THE RESULT OF THE FRAUD COMMITTED ON THE COURTS BY THE RESPONDENT.

On June 5, 1991, the respondent sought leave to file the "entire" deposition of the petitioner as required by the Federal Rules of Civil Procedure (R. 26). That leave was granted by the District Court (R. 4,5). However, the District Court refused to allow the respondent to withdraw the "entire" deposition.

The Petition for Rehearing filed by the petitioner in the Seventh Circuit criticized the order of the Court dated September 21, 1992, because it failed to review deposition exhibit 2, the statement of the petitioner (App. 43). The more counsel thought about this failure, the more he was convinced of the potential that the exhibit had never been filed with the Seventh Circuit or the District Court.

On October 27, 1992, the files in the District Court and the Seventh Circuit were examined. Contrary to the representations by the respondent in its motion of June 5, 1991, the respondent did not file the entire deposition as represented but only the first page of exhibit 2 which consisted of 15 pages (App. 43). The petitioner also filed his notice requesting that the "entire" deposition be part of the record on appeal (R. 39). Exhibit 2 was a statement taken by a railroad claim agent for the respondent and was produced by the respondent to the petitioner in the litigation. It was discussed extensively by the petitioner within his deposition (R. 28, pp. 59-63). As a consequence, both the District Court and the Seventh Circuit were denied an opportunity to review all of the evidence because the respondent withheld evidence from the Court that was favorable to the petitioner.

The District Court had an obligation to review all the evidence presented to it in its light most favorable to the petitioner.

Sulewski v. Federal Express Corporation, 933 F.2d 180, 182 (2d Cir. 1991); *Mean Reinsurance v. Granite State Insurance Company*, 873 F.2d 1185, 1187 (9th Cir. 1989). The Seventh Circuit was required to perform the same type of review de novo. *Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). All reasonable doubts about the facts should have been resolved in favor of the petitioner, the non-moving party. *Tackitt v. Prudential Insurance Company of America*, 758 F.2d 1572, 1574 (11th Cir. 1985). In addition, the non-moving party should have been afforded the benefit of all reasonable inferences to be drawn from the facts. *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 623 (8th Cir. 1981).

It is not disputed that both courts failed to afford the petitioner the type of review to which he was entitled. Neither had the benefit of the statement of the petitioner at the time the reviews were made. Neither afforded the petitioner the inferences and benefit of the doubt to which he was entitled, especially under the liberal standards of FELA litigation. The cursory review by the Seventh Circuit is demonstrated within its opinion by the allegation that the petitioner presented no evidence that most handbrakes on box cars are located at the bottom (App. 15). The petitioner, in his response, specifically pointed out deposition testimony that the unusual location of the handbrake at the top of the box car demonstrated a basis of liability under the failure to provide a reasonably safe place to work (App. 32). Similarly, petitioner's description of the process utilized by respondent certainly presented a reasonable inference that it was unsafe.

The respondent committed a fraud upon the courts by not filing the "entire" deposition while executing a pleading that it had. The normal remedy to follow the award of summary judgment based upon fraud is the vacating of the judgment order. *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1339 (5th Cir. 1978). The same result should follow in this case so that the

petitioner will have an opportunity to present all the evidence[1] to the District Court to rebut the new arguments added by the respondent's memorandum.

Only the intervention of this Court's supervisory powers can prevent the manifest injustice sanctioned by the Seventh Circuit.

CONCLUSION

This Court should exercise its discretion and grant this petition for writ of certiorari to prevent the radical departure of the accepted and usual course by judicial proceedings sanctioned by the Seventh Circuit.

Respectfully submitted,

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DAVID B. DEUTSCH

[1] During the appeal it was discovered that Respondent had withheld a new safety rule and letter from discovery which admitted that getting on and off moving equipment was unsafe.

APPENDIX

APPENDIX A

Minute Order Form (rev. 3/88e)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge or Magistrate: Suzanne B. Conlon

Case Number: 90 C 6448 Date: June 12, 1991

Case Title: David B. Deutsch v. Burlington Northern Railroad Company

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Defendant's Motion for Summary Judgment

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☒ Judgment is entered as follows:

Defendant Burlington Northern Railroad Company's motion for summary judgment is granted. Judgment is entered in favor of Burlington Northern Railroad Company and against David B. Deutsch. ENTER MEMORANDUM OPINION AND ORDER.

/s/ Suzanne B. Conlon

* * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form)

☒ Notice mailed by judge's staff.

courtroom deputy's initials: mkw

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT ILLINOIS
EASTERN DIVISION

No. 90 C 6448

Judge Suzanne B. Conlon

DAVID B. DEUTSCH,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff David B. Deutsch sues defendant Burlington Northern Railroad Company ("Burlington") for injuries Deutsch sustained when he fell from Burlington's boxcar. Pursuant to Fed.R.Civ.P. 56, Burlington moves for summary judgment.

BACKGROUND

At all relevant times, Deutsch was employed as a brakeman for Burlington, a corporation that operates railroad facilities in Chicago. Burlington's Rule 12(1) Statement of Undisputed Facts ("Burlington's Facts") ¶ 1.[1] On November 11, 1987,

[1] Burlington submitted a properly supported 12(1) statement. Local Rule 12(1) requires a party moving for summary judgment to submit a statement of undisputed material facts that the moving party contends entitle it to judgment as a matter of law. Under Local Rule 12(m), a party opposing a motion for summary judgment must file a response to the movant's 12(1) statement of facts, including a statement of additional facts that require the denial of summary judgment, referencing affidavits, parts of the record or other supporting materials. The moving party's material facts are deemed admitted unless controverted by the statement of the nonmoving party. *See* Local Rule 12(m). Deutsch failed to submit a 12(m) statement. Indeed, Deutsch submitted no evidence in response to Burlington's motion for summary judgment. Pursuant to Local Rule 12(m), Burlington's facts are deemed admitted.

Deutsch began working at 9:00 in the morning. *Id.* ¶¶ 1-2. At approximately 10:30 a.m., after securing a hand brake on a railroad car, Deutsch slipped while coming down the ladder attached to the side of the car. *Id.*. ¶ 2.

The cause of Deutsch's accident is unclear. Deutsch believes there "might have been some frost" on the ladder because it was "a little chilly in the morning" and the ladder was on the shaded side of the car. *Id.* Although there had been frost the night before the accident, Deutsch does not recall seeing any frost on the ladder. *Id.* Nor does Deutsch recall feeling frost, wetness or grease on his foot as he climbed the ladder. *Id.* Further, the bottom of Deutsch's shoe did not contain any slush, snow or foreign substance. *Id.*

Following the accident, Deutsch filled out Burlington's standard form for personal injuries. *Id.* ¶ 3. Deutsch reported that he suffered a twisted knee, and was on his way to the clinic to assess the extent of his injuries. Ex. 1, attached to Burlington's motion for summary judgment. Deutsch indicated on the form that there were no defects in the equipment he was using at the time of the accident. *Id.*

On November 5, 1990, Deutsch filed this action, alleging that Burlington violated the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. Deutsch claims Burlington was negligent because it: (1) failed to provide Deutsch with a reasonably safe work place; (2) failed to provide a reasonably proper and adequate ladder on the railroad car which was free from foreign substance; and (3) failed to equip the car with non-skid metal surfaces on the rungs of the ladder.[2]

---

[2] In his response, Deutsch complains that the hand brake was located on top of the boxcar, rather than on the bottom, "as on most cars." Deutsch's response at 4. Thus, Deutsch contends that his task of securing the hand brake was an "unsafe" procedure. *Id.* This claim is not alleged in Deutsch's complaint. Nor has Deutsch produced evidence to support the statement that most hand brakes are located on the bottom of railroad cars. Accordingly, the court need not afford further consideration to this unsubstantiated claim.

DISCUSSION

Summary judgment must be granted when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 959 (7th Cir. 1989). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989). The nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir. 1990). All reasonable inferences must be viewed in favor of the nonmoving party. *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989).

I. Liability under the Federal Employers' Liability Act

The Federal Employers' Liability Act ("FELA") expressly imposes liability on an employer to pay damages for injury or death due "in whole or in part" to the employer's negligence or due to any defects in the employer's machinery. 45 U.S.C. § 51. Certain duties of care have been imputed to employers under FELA, including: (1) the duty to provide a reasonably safe place to work; and (2) the duty to provide reasonably safe tools and equipment. *Ackley v. Chicago and North Western Transp. Co.*, 820 F.2d 263, 266 n. 5 (8th Cir. 1987) (citations omitted).

A. Safe Work Place

An employer breaches its duty to provide a safe work place when it knows or should know of a potential hazard in the work place, yet fails to exercise reasonable care to inform and protect its employees. *Gallose v. Long Island R. Co.*, 878 F.2d 80, 84-85

(2d Cir. 1989). Deutsch alleges that Burlington breached its duty to provide a safe work place, yet Deutsch fails to present any evidence to support a reasonable inference of negligence. There is no evidence that the ladder on the railroad car was improperly maintained, or that the rungs of the ladder were coated with a hazardous foreign substance. To the contrary, the only evidence before the court demonstrates that Deutsch has no idea why he slipped on the ladder. Nor is there any evidence to support the conclusion that Burlington knew or should have known that the ladder was unreasonably dangerous.

Deutsch asserts that in order to proceed to trial on a FELA claim, he need only show that "he was injured in the course of his employment with a carrier by rail in furtherance of interstate commerce." Deutsch's response at 4. It is true that a plaintiff seeking to recover from his or her employer under FELA need not produce overwhelming evidence in order to present the case to the jury. As the Supreme Court explained:

> The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason [infer negligence].

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 (1957). However, it is clear that "[t]he Act does not make the employer an insurer." *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 140 (1959). The plaintiff must still produce *some* evidence of negligence to create a jury question. *Id.* at 140-141. *Accord, Milom v. New York Central R. Co.*, 248 F.2d 52, 54 (7th Cir. 1957), *cert. denied*, 355 U.S. 953 (1958). In this respect, counsel for Deutsch misunderstands the nature of a summary judgment motion. As explained above, the nonmoving party must present affirmative evidence to overcome a properly supported motion for summary judgment. Deutsch may not rest on the allegations in his complaint, but must come forward with some evidence, however minimal, to support his claim. Deutsch failed to present *any*

evidence in opposition to Burlington's motion for summary judgment.[3] Accordingly, Burlington is entitled to summary judgment on Deutsch's claim that Burlington failed to maintain a reasonably safe work place.

B. Safe Ladder

Deutsch maintains that Burlington was negligent in failing to provide a reasonably safe ladder for Deutsch. This claim is twofold. First, Deutsch claims that Burlington failed to eliminate foreign substances from the rungs of the ladder. Complaint ¶ 8(b). As explained in the foregoing discussion, there is no evidence of any foreign substance, aside from Deutsch's unsubstantiated statement that "there might have been some frost" on the ladder.

Second, Deutsch alleges that Burlington should have equipped the boxcar with "non-skid metal surfaces" on the rungs of the ladder. Complaint ¶ 8(c). Deutsch has produced no evidence of the ladder's condition. The only evidence before the court is that Deutsch cannot recall seeing or feeling any slippery substance on the ladder. Indeed, there is no evidence to suggest that the ladder *did not* have a non-skid surface. Nor has Deutsch shown that other railroads use non-skid metal surfaces on their boxcar ladders, or that a non-skid metal surface could have prevented Deutsch's accident. Deutsch cannot survive summary judgment on the mere allegation of negligence; he must produceat least a "scintilla" of evidence to support his claim. *See Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 332 (1958) (Harlan, J. dissenting). Deutsch has not met his burden of proof. Accord-

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[3] Deutsch states that Burlington's attorney "is certainly mistaken if he believes that the deposition he took [of Deutsch] exhausted every conceivable fact that [Deutsch] will mention at trial." Deutsch's response at 1. However, to overcome a properly supported motion for summary judgment, Deutsch must submit affidavits or other evidence supporting the facts Deutsch intends to "mention" at trial in support of his claim.

ingly, summary judgment is proper on Deutsch's claim that Burlington negligently failed to equip the ladder with non-skid metal rungs.

CONCLUSION

Defendant Burlington Northern Railroad Company's motion for summary judgment is granted. Judgment is entered in favor of Burlington Northern Railroad Company and against David B. Deutsch.

ENTER:

/s/Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

June 12, 1991

APPENDIX B

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate: Suzanne B. Conlon

Case Number: 90 C 6448 Date: July 9, 1991

Case Title: David B. Deutsch v. Burlington Northern Railroad Company

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Plaintiff's Rule 59 Motion to Amend Judgment

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry)

Because Deutsch has not presented any grounds for altering or amending the judgment, Deutsch's Rule 59 motion is denied. (See reverse for details.)

/s/ Suzanne B. Conlon

(11) ☒ (For further detail see ☒ order attached on the reverse of

☒ Notice mailed by judge's staff.

courtroom deputy's initials: mkw

(Reserved for use by the Court)

ORDER

Plaintiff David B. Deutsch brought this action under the Federal Employers' Liability Act, ("FELA"), 45 U.S.C. §§ 51-60, against defendant Burlington Northern Railroad Company ("Burlington") to recover for injuries Deutsch sustained when he fell from Burlington's boxcar. On June 12, 1991, the court granted Burlington's motion for summary judgment on the ground that Deutsch failed to produce any evidence to create a general issue of material fact as to Burlington's alleged negligence under FELA. Pursuant to Fed.R.Civ.P. 59, Deutsch now moves to amend the judgment.

Motions to alter or amend a judgment under Rule 59 "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986). The court granted Burlington's properly supported summary judgment motion because Deutsch had failed to present any evidence to support his FELA claim. Deutsch chose instead to oppose Burlington's motion by resting on the allegations in the complaint. Deutsch's response to the summary judgment motion observed that Burlington had not directly challenged Deutsch's claims that: (1) Burlington's workplace was unsafe and (2) Burlington should have provided a non-skid surface on its boxcar ladders. However, Deutsch failed to present any evidence supporting these claims.

Deutsch contends that although Burlington's motion addressed only the alleged slippery substance on the boxcar's ladder, the court improperly expanded the motion for summary judgment to cover all aspects of Deutsch's claims. However, there is no indication that Burlington's motion was intended to resolve only a portion of the case. Burlington did not caption its motion as a "partial motion for summary judgment." Indeed,

Deutsch's response to the summary judgment motion clearly indicates Deutsch's understanding that Burlington sought summary judgment on Deutsch's *entire* case pursuant to Fed.R.Civ.P. 56. Deutsch recognized this fact by pointing out that his suit was based on three alleged examples of negligence, rather than the single issue directly addressed by Burlington. Deutsch had ample opportunity to submit evidence supporting all aspects of his FELA claim, but chose instead to rely on the complaint's allegations. The court therefore concluded that Deutsch failed to raise a genuine issue of material fact with regard to his entire case.

Deutsch now seeks to create a genuine issue of material fact by filing an untimely affidavit. Deutsch offers no reason why he failed to submit his affidavit in opposition to Burlington's motion for summary judgment. Because Deutsch has not presented any grounds for altering or amending the judgment, Deutsch's Rule 59 motion is denied.

/s/Suzanne B. Conlon

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2629

DAVID B. DEUTSCH,
Plaintiff-Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90-C-6448—**Suzanne B. Conlon,** *Judge.*

ARGUED APRIL 6, 1992—DECIDED SEPTEMBER 21, 1992*
OPINION JANUARY 12, 1993

Before POSNER and KANNE, *Circuit Judges,* and BURNS, *Senior District Judge.***

BURNS, *Senior District Judge.* This case is before us on appeal from a grant of summary judgment to Burlington Northern Railroad Company (Burlington Northern). Deutsch is also appealing the district court's denial of his motion to amend or, in the alternative, to set aside the judgment pursuant to Fed. R. Civ. P. 59.

We have jurisdiction under 28 U.S.C. § 1291 (1988).

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* This case originally was decided by unpublished order under Circuit Rule 53. The court has subsequently decided to issue the decision as an opinion.

** The Honorable James M. Burns, Senior District Judge for the District of Oregon, is sitting by designation.

BACKGROUND

Facts

On November 11, 1987, Deutsch, a brakeman for Burlington Northern, was switching railroad cars. This switch required, among other physical maneuvering, that Deutsch mount the anchor car while it was moving, stop the car with the handbrake (which, in this particular case, was located on top of the car), and descend by ladder before other cars collided with the anchor car. As he was coming down from the top of the car after tying the handbrake, he slipped on the ladder and dropped 6-8 feet until his right leg caught in the ladder. As a result of the accident, Deutsch required neck surgery and a lengthy recuperation.

Procedural History

Deutsch filed an action pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), alleging his injury was a result of Burlington Northern's negligence and requesting costs and $500,000 for damages, pain and suffering, lost wages, and lost earning capacity. Burlington Northern moved for summary judgment on the ground that Deutsch's injury was not due to any negligence on its part. Deutsch responded by asking the court to deny Burlington Northern's motion because it directly addressed only one of Deutsch's three claims. Burlington Northern then filed motions for leave to file a deposition transcript and for leave to file a reply to Deutsch's response to the summary judgment motion. On June 5, 1991, Deutsch was given notice that these motions would be before the court June 11, 1991.

When Deutsch's counsel appeared June 11, he found the court had granted Burlington Northern leave to file its requested motions. That same day Burlington Northern filed a reply specifically addressing two of Deutsch's claims. Deutsch's counsel received a copy of the reply June 12, 1991, the same day

the court granted summary judgment to Burlington Northern on all issues. Deutsch then filed a motion under Fed. R. Civ. P. 59 to amend or, in the alternative, to set aside the judgment, contending the above sequence of events constituted a procedural defect in violation of his right to procedural due process under the fifth amendment to the United States Constitution. The court denied Deutsch's Rule 59 motion.

DISCUSSION

SUMMARY JUDGMENT

A grant of summary judgment is reviewed *de novo*. *See PPG Industries, Inc. v. Russell*, 887 F.2d 820, 823 (7th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See generally, Dribeck Importers, Inc. v. G. Heileman Brewing Co., Inc.*, 883 F.2d 569, 573 (7th Cir. 1989).

In his complaint, Deutsch alleged Burlington Northern failed to provide him with a reasonably safe place to work, failed to provide a reasonably proper and adequate ladder on the boxcar free of foreign substance, and failed to equip the boxcar ladder rungs with non-skid metal surfaces. In its motion for summary judgment, Burlington Northern asserted that Deutsch's injuries were not caused by negligence on the railroad company's part. Deutsch now contends the district court erred when it granted summary judgment to Burlington Northern.

Deutsch argues summary judgment was improper because a plaintiff making a FELA claim only has to show he was injured in the course of his employment by a rail carrier in furtherance of interstate commerce in order to obtain a jury trial. *See* 45 U.S.C. § 51. Although the requirements for getting a FELA claim before a jury are slight, Deutsch understates the test. "[T]he quantum of evidence required to establish liability in a[ ] FELA case is much less than in an ordinary negligence action";

the case must go to a jury "when there is even slight evidence of negligence." *Harbin v. Burlington Northern R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990). *See also Wilson v. Chicago, Milw., St. P., & P. R. Co.*, 841 F.2d 1347, 1353 (7th Cir.), *cert. dismissed*, 487 U.S. 1244 (1988) If plaintiff meets that threshold, the issues go to the trier of fact. *See Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 506 (195). The district court found Deutsch did not meet his initial burden of proof.

To defeat a motion for summary judgment in a non-FELA case, the nonmoving party must "make a showing sufficient to establish the existence of the elements essential" to its case, *Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co.*, 826 F.2d 725, 728 (7th Cir. 1987); in other words, nonmovant must present affirmative evidence that a genuine issue of material fact exists. *Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir. 1990). In his response to Burlington Northern's motion, Deutsch chose to rest on the allegations in his complaint;[1] thus, the district court found Deutsch failed to set forth any specific facts or evidence showing a genuine issue of material fact existed concerning Burlington Northern's alleged negligence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). *See also Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989); Fed. R. Civ. P. 56(e).

After reviewing the record, we find Deutsch did not present sufficient evidence to support an inference of negligence on the

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[1] As the district court noted, Deutsch failed to state additional facts, provide affidavits for reference, refer to parts of the record, or refer to other materials in his response to support his claims. Deutsch filed an affidavit only after summary judgment was granted. Burlington Northern's stated facts were, therefore, deemed to be admitted. *See* Local Rule 12(N), Northern District of Illinois, Eastern Division (1990). *See also Tatalovich v. City of Superior*, 904 F.2d 1135 (7th Cir. 1990) (appellate court upheld local rules setting forth procedural requirements to be followed on motions for summary judgment). *See generally*, Fed. R. Civ. P. 56(e).

part of Burlington Northern nor did Deutsch present affirmative evidence showing that a genuine issue of material fact existed concerning Burlington Northern's alleged negligence. For example, Deutsch indicated on the personal injury form provided by Burlington Northern that no defective equipment was involved in his accident; Deutsch presented no evidence suggesting the boxcar ladder was improperly maintained or that a foreign substance coated the ladder; Deutsch presented no evidence regarding the lack of nor the necessity for non-skid metal-surfaced ladder rungs; Deutsch presented no evidence that most hand brakes are located at the bottom of railroad cars; Deutsch presented no evidence that hand brakes located at the top of railroad cars are a safety hazard; and Deutsch presented no evidence that Burlington Northern breached its duty in any manner to provide a safe work place. We find, therefore, Deutsch failed to present a scintilla of evidence to support its claims and failed to show the existence of a genuine issue of material fact concerning Burlington Northern's alleged negligence.

RULE 59 MOTION

A motion to amend or, in the alternative, to set aside the judgment pursuant to Fed. R. Civ. P. 59(e) may only be granted if movant shows there was a mistake of law or fact or presents newly-discovered evidence that could not have been discovered previously. *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). The district court concluded Deutsch did not present any grounds for altering or amending the judgment. We review the district court's denial of Deutsch's Rule 59 motion for abuse of discretion. *Id.* at 1179.

Deutsch's motion was based on the assertion that he was denied his right to due process when the district court permitted Burlington Northern to file a reply but did not afford Deutsch an opportunity to be heard or to respond. According to Local Rule

12(E) of the United States District Court for the Northern District of Illinois, Eastern Division, written notice of intent to present a motion must be served at least two business days before the date of presentment. *See also* Fed. R. Civ. P. 6(d) (written motions shall be served 5 days before hearing date unless *ex parte).* The certificate of service appended to Burlington Northern's Notice of Motion indicates on June 5,1991, copies of the notice and motion were served on co-counsel for Deutsch (federal expressed to R. E. Schum and hand-delivered to John Mullen); the notice reflected a presentment date of June 11, 1991. Deutsch, therefore, had sufficient time to file a written response in opposition to Burlington Northern's motions but failed to do so. Deutsch was not, therefore, denied an opportunity to respond to Burlington Northern's motions. The record does not reflect a request for oral argument by Deutsch.[2] *See* Local Rule 12(Q) (oral argument is at the court's discretion).

Deutsch also asserted in his Rule 59 motion that summary judgment was improperly granted because Burlington Northern only addressed Deutsch's claim of negligence relating to frost on the ladder rungs in its motion for summary judgment and did not directly respond to Deutsch's remaining claims until it filed its reply. Deutsch contends the district court permitted Burlington Northern, in effect, to enlarge and to amend its motion for summary judgment when the court granted Burlington Northern's motion for leave to reply. Burlington Northern's reply was filed June 11, 1991, summary judgment was granted to Burlington

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[2] There is some confusion in Deutsch's briefs as to whether he is also claiming he was denied the opportunity to be heard as to Burlington Northern's motion for summary judgment. The record does not reflect Deutsch requested oral argument in either event. Fed. R. Civ. P. 56(c) does not require a hearing, and oral argument is deemed to be waived when the opposing party does not request it. *Dredge Corp. v. Penny,* 338 F.2d 456, 461-62 (9th Cir. 1964) (citing *Brown v. Quinlan, Inc.,* 138 F.2d 228, 229 (7th Cir. 1943)). *See also* Local Rule 12(Q).

Northern June 12, 1991, and a copy of the reply was not received by Deutsch until June 12, 1991; consequently, Deutsch contends he was denied his right to due process because he did not have an opportunity to respond to Burlington Northern's "amended" summary judgment motion . The district court, however, found the breadth of Burlington Northern's motion for summary judgment (exclusive of the reply filed later) sufficiently encompassed all of the claims set out in Deutsch's complaint. We agree.

In its motion for summary judgment, Burlington Northern asserted Deutsch's injuries were not caused by any negligence on its part. Burlington Northern pointed out Deutsch acknowledged on the company's personal injury form that his injuries were not the result of defective equipment; Burlington Northern further challenged Deutsch's claims relating to the presence of frost or some other foreign substance on the ladder rungs. Deutsch did not meet his burden to present affirmative evidence to show a genuine issue of material fact existed concerning Burlington Northern's negligence or to support an inference of negligence on the part of Burlington Northern.

We agree with the district court that the original motion for summary judgment filed by Burlington Northern was intended to resolve all of Deutsch's claims of negligence; we, therefore, do not need to consider the procedural sequence of events surrounding Burlington Northern's reply. We also agree with the district court's conclusion that Deutsch did not present sufficient affirmative evidence to defeat Burlington Northern's original motion for summary judgment. We, therefore, find the district court did not abuse its discretion when it denied Deutsch's Rule 59 motion on the grounds that Deutsch failed to give sufficient grounds to amend or, in the alternative, to set aside the judgment.

CONCLUSION

Based on the foregoing, we find the district court did not err when it granted summary judgment to Burlington Northern. We further find the district court did not abuse its discretion when it denied Deutsch's Rule 59 motion.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 28, 1992

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Hon. James M. Burns, Senior District Judge*

No. 91-2629

DAVID B. DEUTSCH,
Plaintiff-Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 6448
Suzanne B. Conlon, *Judge.*

ORDER

On October 7, 1992, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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* Hon. James M. Burns of the District of Oregon, sitting by designation.

APPENDIX E

INDEX TO RECORD OF SEVENTH CIRCUIT

1 Civil Docket Sheet

2 Minute orders (11-5-90 to 12-20-90)

3 Minute orders (2-11-90 to 4-10-91)

4 Minute orders (4-10-91 to 6-11-91)

5 Minute orders (6-11-91 to 7-15-91)

6 Minute orders (7-15-91 to 7-22-91)

1-1 Complaint

1-2 JS 44

1-3 Appearance Form - Plaintiff

1-4 Affidavit Evidencing Compliance With General Rule 39 - Plaintiff

1-5 Affidavit Evidencing Compliance With General Rule 39 - Plaintiff

1-6 Affidavit Evidencing Compliance With General Rule 39 - Plaintiff

3A Order of 11-15-90

4A Defendant's Answer

5A Appearance Form - Defendant

6A Affidavit Evidencing Compliance With General Rule 39 - Defendant

7 Affidavit Evidencing Compliance With General Rule 39 - Defendant

8 Affidavit Evidencing Compliance With General Rule 39 - Defendant

9 Affidavit Evidencing Compliance With General Rule 39 - Defendant

10 Order of 12-20-90

22 Motion for Summary Judgment

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23 Order of 5-22-91

24 Plaintiff's Memorandum and Response to Defendant's Motion for Summary Judgment

26 Notice of Motion filed 6-11-91

26 Defendant's Motion for Leave to File Deposition

27 Order of 6-11-91

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29 Defendant's Reply to Plaintiff's Response

30 Memorandum Opinion and Order Docketed 6-14-91 but dated 6-12-9

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33 Rule 59 Motion of Plaintiff and Plaintiff's Affidavit

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39 Plaintiff's Notice to Supplement Record

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

90 C 6448

Judge Conlon

DAVID B. DEUTSCH,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

DEFENDANT BURLINGTON NORTHERN RAILROAD COMPANY'S MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant, Burlington Northern railroad Company, by and through its attorneys, and pursuant to Federal Rule of Civil Procedure 56 (FED.R.CIV.P. 56) and Rule 12 of the Rules of the United States District Court for the Northern District of Illinois, respectfully moves this Court for an order granting it summary judgment in its behalf as there is no genuine issue of any material fact and the defendant is entitled to judgment as a matter of law. In support where of, defendant states:

MATERIAL FACTS AS TO WHICH THERE IS NO DISPUTE

1. The plaintiff, David Deutsch, was employed by Burlington Northern Railroad Company as a brakeman/switchman and maintains this action under the Federal Employers' Liability Act (45 U.S.C. §51), hereinafter "FELA", alleging an employment related accident with Burlington Northern Railroad Company on November 11, 1987. See the plaintiff's complaint attached

hereto as Exhibit A and by this reference made a part hereof. Plaintiff alleges negligence against the defendant which caused him to slip on a ladder attached to a boxcar. Defendant has answered the complaint denying all allegation against it, a true and accurate copy of which is attached hereto as Exhibit B.

2. Excerpts of plaintiff's deposition are attached as Exhibit C. The morning of the incident referred to in plaintiff's complaint, plaintiff began working at 9:00 A.M. and the incident referred to occurred at approximately 10:30 A.M. Plaintiff had just completed securing a hand brake on a railroad car and was climbing down the ladder attached to the side of the car when the incident occurred, (pl. dep., p. 66). Plaintiff tied down the hand brake without incident (pl. dep., p. 74). Plaintiff slipped on his way down the ladder (pl. dep., p. 66). As to what "caused" his foot to slip, plaintiff thought "it might have been some frost" because it was "a little chilly in the morning" and he was on the "shadow" side of the car (pl. dep., p. 81). However, plaintiff did not recall seeing any frost, and there was not anything about his foot which told him that it was frost or wetness or grease or anything else which caused him to slip (pl. dep., p. 82) and as far as plaintiff knew, there was no foreign substance on the sole of his shoes (pl. dep., p. 82). Plaintiff did not go back up the ladder to inspect the rung on which he slipped and he did not see any frost or any grease on the rung on which he slipped (pl. dep., pp. 80-81). Plaintiff recalls some frost the night before the alleged incident, but plaintiff does not remember any climactic conditions such as snow (pl. dep., pp. 67-68). Plaintiff could not remember any mud puddles in the area and he did not believe there was any slush or snow or ice on his boots (pl. dep., p. 77).

3. Following the incident, plaintiff filled out a standard personal injury report (pl. dep., p. 87). Attached hereto as Deutsch deposition Exhibit 1 under date of March 14, 1991. Thereon, plaintiff marked that there were no defects involved with the equipment he was using at the time of the incident.

In support of its contentions, the defendant submits the following memorandum of law.

MEMORANDUM OF LAW

I.

WHERE, AS HERE, THE EVIDENCE ADDUCED BY THE PLAINTIFF REQUIRES THE JURY TO SPECULATE AS TO ANY CONNECTION BETWEEN THE NEGLIGENCE ALLEGED AND THE PLAINTIFF'S INCIDENT, JUDGMENT FOR THE DEFENDANT IS MANDATED AS A MATTER OF LAW.

A. Plaintiff's own testimony fails to give rise to a genuine issue of material fact as to defendant's alleged negligence or the causal connection between the "frost" and plaintiff's incident.

Plaintiff apparently alleges that defendant was negligent in either allowing frost to form on the rungs of the ladder plaintiff slipped on or in not removing the frost before plaintiff climbed the ladder. Under the FELA, a jury question is generated if the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 (1957). However, since *Rogers* the United States Supreme Court has also reiterated that the plaintiff still has the burden of proving *some* act of negligence by the railroad in order to present his case to the jury. *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138 (1959). And where, as here, the jury could reach a verdict in favor of the plaintiff only by sheer conjecture and speculation, judgment for the defendant must be entered as a matter of law. *Hurley v. Patapsco & Backrivers R. Co.* 888 F.2d 327 (4th Cir. 1989). In the instant case, plaintiff testified he thinks "it might have been

some frost" which caused his foot to slip in the incident. However, plaintiff did not observe any frost, or grease, or snow on the ladder on which he lost his footing and importantly, there was nothing about the action of his foot in slipping on the ladder rung which told him that it was "frost or wetness or grease or anything else". Plaintiff testified that there was no foreign substance on his shoes which could have caused the incident. Under these circumstances, any verdict rendered by the jury on behalf of plaintiff would be based solely on speculation and conjecture; the jury would have to resort to straight out guess work to conclude there 1) "might have been" frost on the rung of the ladder and 2) the frost was a cause, in whole or in part, of plaintiff's incident. Plaintiff himself cannot testify to the presence of frost or any alleged causal connection between frost and the incident (pl. dep., pp. 81-82).

In *Hurley*, supra, the plaintiff testified that inadequate lighting caused his incident. However, plaintiff submitted no evidence as to inadequate lighting, outside of his own testimony, and plaintiff "never provided an evidentiary link between the allegedly inadequate lighting and his accident." *Hurley*, at 330. In *Hurley*, as here, the plaintiff's testimony was the only evidence concerning alleged negligence. In *Hurley* the plaintiff testified that inadequate lighting was in fact prevalent in the work area and in fact caused the accident. Here, the plaintiff testified there "might have been" frost because the ladder in question was out of the sun and it was "chilly" the morning of the incident. Here, the plaintiff also testified that there was nothing about the action of his foot, when he slipped on the ladder, which made him believe it was frost, or any other substance, which caused his foot to slip. If judgment as a matter of law was warranted in *Hurley*, then *a fortiori*, judgment as a matter of law is warranted in the instant case.

Plaintiff's testimony is as fatally defective as that in *Kuberski v. New York Central Railroad Company*, 359 F.2d 90 (2d Cir.

1966) where the plaintiff also candidly admitted that he could not testify as to what caused him to fall. Here, the plaintiff also candidly admitted that he could not remember anything about the action of his foot which led him to believe it was frost or any other substance which caused his incident (pl. dep., pp. 81-82). *Kuberski* is on all four squares with the instant case. Here, the plaintiff similarly cannot testify that frost or any other substance was a cause, in whole or in part, of his foot slipping and cannot even in fact testify frost was present, only that it "might have been". The absence of a causal connection and plaintiff's speculation of the "possible" existence of frost both dictate that summary judgment should issue for the defendant.

II

THE PLAINTIFF HAS FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT CONCERNING DEFENDANT'S NOTICE OF ANY HAZARDOUS CONDITION CREATED BY THE ALLEGED PRESENCE OF FROST AND SUMMARY JUDGMENT MUST ISSUE FOR DEFENDANT.

A. The natural accumulation of frost on a boxcar ladder does not establish negligence.

As stated by the Fifth Circuit Court of Appeal, "a railway company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise that degree of care commensurate with the risks to prevent the accumulation of snow and ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards. The employer is not, however, the insurer of the safety of his employee, and the test is whether reasonable or ordinary care has been exercised by the employer in that regard." *Fort Worth & Denver City Ry. Co. v. Smith,* 206 F.2 667 (5th Cir. 1953). In *Smith,* the climatic conditions were such that the entire railroad yard was covered with snow, ice and

sleet. Obviously, the railroad had some control over remedial measures which could be taken to alleviate the condition. Defendant's safety rules were introduced into evidence which indicated a failure to remove such accumulations was a rule violation and could be considered negligence on the part of the defendant. However, the Fifth Circuit Court of Appeals reversed the jury verdict of the plaintiff and entered judgment on behalf of the defendant as a matter of law holding that although a jury question was generated on negligence, there was virtually no evidence of any causal connection between the plaintiff's heart attack and the climatic conditions. Here, in addition to the absence of the causal connection, plaintiff can hardly state that a thin layer of frost (which plaintiff did not observe) on a "chilly" morning constitutes such an "accumulation of snow and in such quantity, form, and location as to be a menace to the safety of its employees." Defendant could not control the temperature or prevent a morning in November from becoming "chilly" and causing the natural accumulation of frost (even assuming there was any, and plaintiff could not testify there in fact was). To suggest that defendant cease its operations, even for a short period of time, every time frost forms, or snow falls, or clouds gather in the sky indicating a rain fall, is to suggest the absurd. Even assuming the presence of frost, there is virtually nothing in the record to suggest that the accumulations were such that defendant was on notice of a hazard to the safety of its employees. Accordingly, aside from the fact that plaintiff has offered virtually no evidence establishing a causal connection between the alleged negligence and the incident, the plaintiff has failed to generate a jury question on defendant's negligence, even assuming there was in fact frost on the ladder plaintiff was alighting at the time of the incident. Summary judgment must issue for the defendant.

The Seventh Circuit Court of Appeals has recognized that the mere occurrence of an injury to an employee while employed by a railroad does not make the employer liable under the FELA;

only injuries causally connected to the employer's negligence are cognizable under the FELA. *Milom v. New York Central Railroad Company*, 248 F.2d 52 (7th Cir. 1957), cert. den., 355 U.S. 953 (1958), rehearing den., 356 U.S. 934 (1958). See also *Baum v. Baltimore & Ohio R.R. Co.*, 256 F.2d 753 (7th Cir. 1958), cert. den., 358 U.S. 881 (1958). The verdict must be based on positive and affirmative evidence and not on speculation, conjecture, surmise or guess work which is all plaintiff offers in the case at bar.

III

Conclusion

Defendant is well aware of the liberal standards under the FELA which favor railroad workers. While plaintiff will argue that he needs only a small amount of evidence of negligence which, in whole or in part, caused his injury, the Federal Appellate decisional law, including cases decided by United States Supreme Court, established that there must be *some* evidence of negligence and *some* evidence of a causal connection between that negligence and the incident. The plaintiff has completely failed, at the close of all discovery, to establish any negligence on the part of the defendant, even extending the plaintiff the benefit of every doubt and assuming (contrary to his own testimony) that there was in fact frost on the ladder plaintiff was alighting. Plaintiff has further failed to establish any causal connection whatever between this alleged frost and his incident. Defendant is entitled to judgment as a matter of law.

KENNETH J. WYSOGLAD
& ASSOCIATES

/s/John Newell
John Newell

John Newell
Kenneth Wysoglad & Associates
Attorneys for Defendant
Burlington Northern Railroad Company
200 W. Monroe St., Suite 1002B
Chicago, IL 60606
(312) 372-2497

APPENDIX G

IN THE FEDERAL DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

90 C 6448

Magistrate Gottschall

DAVID B. DEUTSCH,
Plaintiff,
BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

PLAINTIFF'S MEMORANDUM AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by the Defendant confuses several basic concepts of the substantive law and trial practice while intentionally overlooking several other allegations of negligence made by the Plaintiff within his Complaint which individually could support a verdict in favor of the Plaintiff against the Defendant.

The Defendant, within its Motion and Memorandum, assumes that the deposition of the Plaintiff is his trial testimony. It certainly is not. The deposition of the Plaintiff merely constitutes his response to the questions asked by the railroad attorney. That attorney is certainly mistaken if he believes that the deposition he took exhausted every conceivable fact that the Plaintiff will mention at trial. There certainly will be other elements which were not the subject of an injury by the railroad attorney. Secondly, it is absurd for the Defendant to maintain the position that its attorney can merely ask questions in a deposition, obtain responses, and assume that the end result constitutes the Plaintiff's evidence at trial.

The Railroad wrongly maintains that the Plaintiff, in a deposition taken by adverse counsel, has the burden to offer evidence to support a causal connection between the negligence of the Defendant and the occurrence so that a jury question is present. The Plaintiff does not have the responsibility to prove his case at the close of discovery as the Defendant maintains. That burden clearly occurs at the close of the evidence when the Plaintiff will have the benefit of his testimony as well as his co-workers. The railroad has confused the role of a Motion for Directed Verdict at the close of the Plaintiff's evidence with a Motion for Summary Judgment. The Defendant has cited no case in support of a Motion for Summary Judgment in a FELA case because none exist relative to factual details pertaining to an injury.

All that an injured railroad employee must show in a FELA case is negligence in the slightest amount which played any role, no matter how small, in bringing about the injury. *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500 (1957). Justices Harlan and Frankfurter, in examining the *Rogers* decision, stated that the Court, in effect, had established a "scintilla" rule relative to the amount of negligence necessary to support a FELA verdict. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 78 S.Ct. 758 (1958).

The standard of liability under FELA is liberal because the railroad has a nondelegable duty to provide its employees with a safe place to work. *Almendarez v. Atchison, Topeka & Santa Fe Railway Co.,* 426 F.2d 1095, 1098 (1970). The aspects of liability under FELA were brought home to this Defendant in *Kalanick v. Burlington Northern Railroad Company,* 788 P.2d 901, 905 (Mont. 1990)-

> "There are duties imputed to the carrier under the Act, including: the duty to provide a safe workplace, *Tiller v. Atlantic Coast Line R.R.* (1943), 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610; the duty to furnish employees with suitable equipment to enable the employee to perform work safely, *St. Louis*

> *Southwestern Ry. Co. v. Greene* (Tex. 1977), 552 S.W.2d 880, 884; the duty to provide sufficient manpower to complete work in a reasonably safe manner, *Blair v. Baltimore & O. R. Co.* (1945), 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490; and the duty to assign workers to jobs for which they are qualified and to avoid placing them in jobs beyond their physical capabilities, *Fletcher v. Union Pac. R.R.* (8th Cir. 1980), 621 F.2d 902, 909, cert, denied 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839. See generally *Ackley v. Chicago and North Western Transp. Co.* (8th Cir. 1987) 820 F.2d 263.

The Complaint of the Plaintiff had three allegations of negligence. The motion and memorandum of the Defendant only deal with one of the three.

The Plaintiff, at the time of his injury, had to board a moving car, climb up a ladder to the top of a car, apply the handbrake and get off the car before another car already in motion collided with that car. The Plaintiff alleges that the Defendant failed to provide him a safe place to work in light of that prescribed method of doing the work and the potential of the process being complicated by the presence of frost or grease on the ladder. On page 67 of the deposition attached to the Defendant's motion, the Plaintiff complained that the location of the handbrake was on top of the car rather than on the bottom as on most cars which made that procedure unsafe. The Defendant failed to follow up with any questions or address that issue in the motion.

The Complaint of Plaintiff also alleged that the rungs on the ladder should have been covered with a non-skid surface. The Defendant elected not to discuss the allegation within the deposition or the Motion for Summary Judgment.

The Defendant clearly has an obligation under *Greene* to furnish its employee with safe and suitable equipment. The Plaintiff, in his pleading and his deposition, specified two reasons he felt that the equipment was not suitable even though

the items on the car were functioning within the limitations of their design. As a consequence, the Plaintiff has presented the potential of three areas of liability at the time of trial. At the close of discovery the Plaintiff need not go beyond that and satisfy his burden of proof. All that the Plaintiff in a FELA case must show prior to trial is that he was injured in the course of his employment with a carrier by rail in furtherance of interstate commerce. The Plaintiff has fulfilled these basic requirements which the Defendant does not contest. Everything else is for the trier of fact, the jury, as specified by the statute.

Lastly, the Plaintiff takes exception to the late filing of the Motion for Summary Judgment by the Defendant on May 17, 1990. The Plaintiff's deposition was taken on March 14, 1990 and the transcript was in the possession of the Defendant within two weeks.

The motion of the Defendant, as a matter of law, should be denied.

Respectfully submitted ,

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

90 C 6448

Judge Conlon

DAVID B. DEUTSCH,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant, burlington Northern Railroad Company, by and through its attorneys, and pursuant to leave of Court respectfully files this brief reply to plaintiff's response to defendant's motion for summary judgment and also respectfully files the deposition transcript of David Deutsch, attached hereto as Exhibit A.

I. THE PLAINTIFF'S RESPONSE FAILS TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON DEFENDANT'S ALLEGED NEGLIGENCE AND SUMMARY JUDGMENT IS THE APPROPRIATE REMEDY.

A.

The plaintiff cannot rest on the unsupported and unsubstantiated conclusions in his complaint but must introduce affirmative evidence

to defeat defendant's motion for summary judgment

Where, as here, the undisputed evidence in the record establishes that plaintiff will not be able to satisfy his burden of proof at trial, summary judgment is the appropriate remedy for the defendant. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Contrary to plaintiff's position in his response, an FELA plaintiff may not rest on the allegations of his complaint but must introduce affirmative evidence establishing a genuine issue of material fact on the issues of negligence, causal connection, and damages. *Inman v. Baltimore and Ohio Railroad Company,* 361 U.S. 138 (1959). Here, plaintiff has failed to introduce any evidence whatever to raise a genuine issue of material fact which would entitle him to a jury trial.

Plaintiff states, in his response, that he alleged in his complaint that the absence of "non-skid metal surfaces" on the rungs of the ladder which he was descending was an operable allegation of negligence defendant ignored in the motion for summary judgment. Plaintiff's argument is misplaced for four reasons. First, the allegation is conclusory and confusing. The term "non-skid" has no specific meaning.[1] Second, plaintiff did not testify

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[1] The Federal Railroad Administration, a branch of the United States Department of Transportation, has promulgated rules setting forth the standards for safety features of railroad cars, including ladders, ladder rungs, and handbrakes. See 49 CFR 231, et. seq. The term "non-skid" does not appear anywhere in the regulations regarding ladders nor is there any prohibition against the location of a handbrake on top of the railroad car which plaintiff in his response also argues is negligence. Plaintiff adduced no evidence to suggest that defendant was not in compliance with the rules of the Federal Railroad Administration which dictate the standards defendant follow. Since plaintiff testified he believed it was "frost" which caused him to slip, it seems apparent that the arguments mounted in plaintiff's response regarding the absence of "non-skid" ladder rungs or the placement of the handbrake are merely efforts to confuse the issues before the Court and avoid the issuance of summary judgment.

his accident was in any way caused by the so-called "non-skid" features of the ladder rungs; rather, plaintiff testified "I think it might have been some frost" when asked what caused his foot to slip (pl. dep. 81) and did not testify his foot "skidded" at all. Third, only an expert witness (which plaintiff has not retained) would have the expertise and competence to testify at trial concerning what is meant by a "non-skid" surface on a railroad ladder rung and whether such equipment is even available to the railroad industry at the present time. Assuming availability, such expert testimony would be necessary on the feasibility of such equipment and whether such equipment was necessary to provide a reasonably safe place to work. Plaintiff certainly cannot provide such testimony on his own behalf. It is axiomatic only competent evidence can be considered in a summary judgment proceeding. Fourth, plaintiff apparently suggests in his response that it is the defendant's *absolute duty* to provide "accident proof" equipment under all circumstances to prevent these types of incidents. But the defendant is not the insurer of the safety of its employees (*Inman*, supra) and the issue is not whether the accident occurred but rather whether there is any evidence that defendant failed in its duty of reasonable care as to the work place and the equipment.

The foregoing considerations are also applicable to plaintiff's position in his response that defendant was somehow negligent because plaintiff was required to climb to the top of the railroad car to fasten the hand brake. Plaintiff states in his response that "most" railroad cars have brakes located on the bottom of the car, instead of the top, but provides no evidence, not even his own affidavit, to support the statement. Furthermore, as with the allegation concerning the absence of "non-skid" material on the ladder rungs, plaintiff has not retained any expert to support his allegation. Also, the fact that plaintiff was required to climb up the ladder and "tie down" the hand brake had virtually nothing to do with his accident. The procedure was completed without incident. (Pl. dep. pp. 7475). Plaintiff cannot testify he was

hurrying to get down the ladder, to avoid the potential of having another railroad car collide into his railroad car, as suggested in plaintiff's response. Rather, the work being performed was routine, and without incident. (Pl. dep. p. 73). Unless plaintiff introduces evidence of some negligence on the part of defendant, plaintiff cannot recover on the basis that his job duties on the day of the incident required him to climb down a railroad ladder after tightening a handbrake, whereas on other occasions the handbrake was located near the bottom of the car.

Plaintiff cannot resort to allegations of negligence, either in a summary judgment proceeding or at trial, without supporting evidence. Plaintiff's allegations of negligence regarding the hand brake location on the top of the railroad car and the absence of "non-skid" surfaces on the rungs of the ladder cannot be established by plaintiff's mere conclusory testimony. Additionally, plaintiff's own testimony that he "thought it was frost" that caused him to slip completely excludes the potential absence of "non-skid" material on the ladders as a causative agent in the incident, unless plaintiff concedes that his cause of action is based on the misplaced notion that the defendant is the absolute insurer of the plaintiff. Additionally, as respects the location of the hand brake, the mere fact that plaintiff was required to come down the ladder (which plaintiff will concede was a normal part of his job) does not impose negligence on defendant. And lastly, plaintiff's conclusory allegations concerning an "unsafe place to work" suffers from the same infirmity as the other allegations of negligence. For the foregoing reasons, defendant respectfully requests this Court grant it summary judgment on the complaint of the plaintiff.

B.

Summary judgment is an available and appropriate remedy

Plaintiff argues that summary judgment is never available to a defendant railroad "relative to factual details pertaining to an

injury".[2] However, plaintiff does not cite any case authority for the proposition that the summary judgment procedure is restricted to non-railroad defendants. Plaintiff also ignores that the "factual details" concerning this incident *have been provided by plaintiff himself* and are not in dispute. It is agreed that plaintiff was alone at the time of this incident and he will offer no admissible evidence at trial except that which is before the Court at the present time. (See also Exhibit 1 to Deutsch deposition, where plaintiff did not identify any defects in the equipment, checking "none" in the appropriate box on the Personal Injury form).

A host of federal appellate decisional law indicates that where, as here, the undisputed evidence establishes that plaintiff cannot satisfy one of the elements of his burden of proof in an action under the FELA, the defendant is entitled to judgment as a matter of law. The procedure available to defendants includes directed verdicts, *Moore v. Chesapeake & Ohio Railroad Company*, 340 U.S. 573 (1951) and summary judgments, *Tobin v. National Railroad Passenger Corporation*, 677 F.Supp. 674 (D. Mass. 1988), citing *Celotex*, supra.

Plaintiff takes exception to the filing of the motion for summary judgment "two months after" the conclusion of the deposition of plaintiff. However, the motion for summary judgment was timely filed, according to the order of the Court, and plaintiff's counsel reserved signature on the deposition. The defendant was required to wait to determine if any substantive

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[2] Plaintiff is incorrect in stating there are no cases where a railroad has prevailed in a summary judgment motion based on "factual details" of an incident. As a practical matter, most orders on motions for summary judgment, in both state and federal court, are not formally reported. However, there are decisions in both state and federal trial courts where summary judgment has been granted to a defendant railroad based on the undisputed material facts. See, for example, Exhibit B attached hereto.

changes would be made to the deposition transcript before filing the motion for summary judgment and was notified by the Court reporter that signature was waived due to the lapse of time, approximately May 9, 1991. Plaintiff's exception to the filing of the motion for summary judgment has no merit.

II. CONCLUSION

Plaintiff testified at his deposition that "frost might have" caused this incident but further indicated he had no operative facts to support the allegation. Plaintiff has adduced no testimony to indicate that the absence of "non-skid" surfaces on the rungs of the ladder is a cognizable allegation of negligence. The same is true for the location of the hand brake on top of the railroad car, as opposed to the bottom. In addition, neither of these alleged allegations of negligence was a legally sufficient cause, in whole or in part, of the incident involving the plaintiff, based on plaintiff's own testimony. The plaintiff has not satisfied the burden of proof of introducing any operative facts concerning defendant's alleged negligence. Accordingly, defendant's motion for summary judgment should be granted.

KENNETH J. WYSOGLAD
& ASSOCIATES

/s/John Newell
John Newell

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

91-2629

DAVID B. DEUTSCH,
Plaintiff/Appellant,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant/Appellee.

Appeal from United States District Court
District of Illinois,
Northern District,
Eastern Division

Hon. Suzanne Conlon,
District Judge
District Court No. 90 C 6448

AFFIDAVIT OF JOHN H. LESKERA

COMES NOW JOHN H. LESKERA, after having first been duly sworn, and states the following under oath:

1. I am an attorney practicing with the law firm of Blunt & Schum.

2. On October 27, 1992 I examined *Deutsch v. Burlington Northern Railroad Company*, Cause Number 91-2629, in the United States Court of Appeals for the Seventh Circuit in Chicago, Illinois.

3. Bill Burkholz, an employee of the Court of Appeals, provided to me a complete copy of *Deutsch v. Burlington Northern Railroad Company*, Cause Number 91-2629, in the

United States Court of Appeals for the Seventh Circuit in Chicago, Illinois.

4. The deposition of David B. Deutsch was filed with the Appellate Court on August 31, 1991.

5. The four exhibits attached to the deposition of David B. Deutsch contained only a photocopy of the first page of such exhibits.

6. Exhibit Number 2, the statement of David B. Deutsch, contained only a photocopy of the first page and did not contain the remaining pages of the exhibit.

7. I checked the file at the United States District Court for the Northern District of Illinois for the matter *David B. Deutsch v. Burlington Northern Railroad Company*, Cause Number 90-C-6448, in the U. S. District Court for the Northern District of Illinois, Eastern Division.

8. I was advised by an employee of the U. S. District Court that the exhibits had been sent to the U. S. Court of Appeals for the Seventh Circuit.

9. I swear that the above information is true and correct to the best of my knowledge, information and belief.

/s/John H. Leskera

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Attorneys for Plaintiff

Subscribed and sworn to before me this 28th day of October, 1992.

/s/Kay Anne Kuehne
Notary Public

My Commission Expires:
9/20/93

APPENDIX J

[1]

BURLINGTON NORTHERN RAILROAD

Deutsch DEPOSITION
EXHIBIT 2 3/14/91
Sonntag Reporting 708-232-0262

THIS IS DON ROBINSON ON FEBRUARY 16TH, 1988 AT EOLA, ILLINOIS SPEAKING WITH MR. DAVID DEUTSCH REGARDING HIS INJURY AT ROCHELLE, ILLINOIS ON NOVEMBER THE 18TH, ER NOVEMBER THE 11TH, 1987.

Q. Dave are you aware the conversation is being recorded?

A. Yes.

Q. Do I have your permission to do so sir?

A. Yes.

Q. Would you state your full name and spell your last name, please?

A. David B. Deutsch, D-E-U-T-S-C-H.

Q. Your home address sir?

A. 1835 Brighton Circle, Aurora, Illinois

Q. Your date of birth, Dave?

A. 6-2-55.

Q. And where were you born at, sir?

A. Aurora.

Q. Ah is there anyone dependent upon you for support Dave?

A. No.

Q. Your ah social security number, sir?

A. 350-50-5553.

Q. Well like to have that in a poker game, wouldn't you?

A. Yeah.

Q. Your employee number?

A. 730272-2.

Q. And your date of service with the railroad?

A. 6-4-73

[2]

Q. And your official occupation?

A. Ah when I was injured working as a brakeman. But brakeman or conductor.

Q. Okay. Ah going back to November 11th, 1987 ah you working as ah brakeman out there at Rochelle?

A. Yes.

Q. And this assignment is known as what, Rochelle switcher?

A. Road switch.

Q. Road switch, what's that, G103 or something like that?

A. Oh God, I don't know.

Q. Okay. Remember who the other members of the crew were that day?

A. Ahhh, Bill Zolpher was conductor, Francis Glaser another brakeman, and I'm not sure about the engineer. Could have been Eddie Joerger, but I'm not positive about that.

Q. Eddie worked out there most of last summer that I can recall.

A. Yeah.

Q. Okay. And what time did that ah job go to work, at that time normally?

A. I think it was 9 o'clock. But they were changing us around almost daily so it could a little bit one way or another.

Q. Okay. Now but it starts somewhere between 7 and 10?

A. Yeah.

Q. And as you recall, would have been around 9 o'clock then?

A. Pretty sure that's what it was.

[3]

Q. What ah, what does that job normally do out there?

A. Ah, industrial switching, some switching in the, in the yard at Rochelle.

Q. Okay. Normally you go right to work at the Rochelle Depot then?

A. Yeah.

Q. Report. Go out pick up your engine ah, do you have any, go to the yard first and try to make ah?

A. Generally we go straight to the yard. Get our train together and then go for the industries.

Q. Okay. The industries are out there at the, the south end of town, Carnation and FDL?

A. Yeah (inaudible).

Q. Okay. 199 got what, you also go out and do ah road work with that?

A. Uhmmm, not usually.

Q. Okay. Pretty well stabled in the confines of Rochelle?

A. Yeah.

Q. On ah, this particular day now we're ah talking about you being injured right around 10:30 in the morning. What ah, what were you doing at that point?

A. We were switching in the Rochelle yard under, out, almost underneath the I-5 bridge, 88 bridge.

Q. Okay. This is out towards Carnation and ah FDL?

A. Right.

Q. And, do you remember what you were doing out there, were you getting ready to switch cars into the two plants or just making up your train or?

A. No, we were just switching out our cars, I was the fieldman.

[4]

Q. Okay. And Glaser would have been what, on the switches then?

A. Yeah, switches and pins.

Q. Okay. What's ah Zolpher doing now?

A. Ah he was up there dictating, helping them putting switches and pins there, they all work together.

Q. And Joerger would have been down probably at the east end or the engineer would have been?

A. Yeah, he was quite a ways away.

Q. Okay. You switching from east to west?

A. East to west.

Q. Okay. Your ah function as a fieldman, what are you doing now at the time of your injury?

A. Ah, watch for rollbacks, tie handbrakes, release handbrakes and make air hoses.

Q. Okay. So you're down away from them, approximately how far away are you from the other members of the crew?

A. Sometimes, well rough, generally, 75, 100 yards.

Q. Okay. And 10:30 now, see if you go a car number on here, no we don't.

A. There should be.

Q. Oh, yes there is, BN 953535 on the brake end. You come to this car ah, what are you doing with this car now?

A. Tying a hand brake on it, they'd just kicked it in to me.

Q. Okay. Remember what track you're on down there?

A. Oh God, I think probably four or five in the yard.

Q. This would have been the first car kicked in then, so you go up tie a handbrake, make sure the rest of the cars stop up against it?

[5]

A. I believe so.

Q. Okay. That would be the normal function in tying the brake?

A. Normal, yeah general sequence, right.

Q. Okay. And ah its got down here the B end which you have to go up and tie the handbrake on?

A. Right.

Q. High handbrake?

A. Yes.

Q. Okay. And ah, which end is the, the B end out there, east end, west end?

A. Ah west end.

Q. Okay. And you're just about underneath the, the bridge?

A. No, I was, they'd kicked it in, in a ways, I was probably 75 yards west of the bridge.

Q. Okay. And what side do you climb up now?

A. That would have been on the north side.

Q. Okay. East and west of the railroad, is not necessarily east and west.

A. Yeah.

Q. That track actually out there runs generally north and south.

A. Ahhhh, we think, okay we think it was east and west.

Q. By I, I, by me compass direction.

A. Okay yes.

Q. Figuring I-5 is east and west, our track actually runs north and south.

A. Yeah.

[6]

Q. So the north side of the car, railroad side would actually be the east side, compass side?

A. Ahhh, yeah I guess so. Right, that's right yeah that's right I think so. I gotcha now.

Q. Get my little piece of paper. Okay, we got I-5 . . .

A. Shadow side.

Q. Which is east and west.

A. Okay.

Q. And we got the tracks there and we got the railroad car. So actually our tracks are running north and south. Now, the brake end was on the north end compass direction and you would have climbed up the east side of the particular car?

A. Right.

Q. Okay. You guys know what you're talking about. But I'm, I'm a civilian.

A. I understand that.

Q. Okay. And do you ah come up to the car are there any problems with the car that you're aware of?

A. No, everything seemed normal.

Q. You just climbed up, and had no problems getting up it?

A. Uh-huh, that's right.

Q. Okay. Have any problems with the handbrake itself?

A. No.

Q. Okay. When do you actually start having some trouble with that?

A. Now I was coming back down, pretty sure that's when it was, I was coming back down.

Q. Okay. You put the one foot on the platform, you tied the brake down?

[7]

[8A. Stood back around to the side and started to come back down. . .

Q. Started coming, you remember about where you started having the problem?

A. Oh. . .

Q. Near the top, middle . . .

A. Approx, approximately the middle. Approximately the middle, maybe two thirds of the way up.

Q. Okay. And what happened to you at this point then?

A. I slipped, I presumed it was frosting, it was on the shadow side. And ah I fell down and towards the bottom I got caught, my leg. I'm not sure if it was stirrup or pinlifter or what, but I got caught. Then ah I never did actually hit the around. It gave mv body a pretty good snap.

Q. Okay. So when you start coming down, your feet actually come out the the stirrups or the the rungs there?

A. Yeah.

Q. And you're just starting to drop down?

A. No I caught, while I was falling I got caught.

Q. Okay. When you're holding the ladder coming down, you got the outside of it? Or you're holding onto the rungs?

A. I don't remember, but I believe I had hold to the rungs.

Q. Okay. So when your feet go you, you more or less jerked that way and about the same time your leg gets hung up on whatever it got hung up, down at the bottom?

A. Yeah.

Q. Fully extended is what I'm asking, or close to it.

[8]

A. Ah once when I fell, no my hands everything kind of came loose about the same time. I slipped, it happened, caught me by surprise.

Q. Oh you, you actually lost grip on the, the rungs then, okay?

A. Yes, yes.

Q. So you're, in effect free falling feet first coming down?

A. Yes.

Q. And somewhere down there your leg gets hung up on either a stirrup or the ah pinlifter?

A. I'm not really sure on that.

Q. Okay. Which leg gets, gets hung up now?

A. I don't know, I'm not sure. Ah it happened so quick, I'm not sure. I would almost think probably the one that I hurt.

Q. Okay. Which one was that? It says twisted knee.

A. Right leg.

Q. Okay. This is the one that ah?

A. I'm going on the assumption that's the one I must have caught. I don't, it happened so fast I don't know for positive.

Q. You don't actually get hung up on it then? You, you more or less hits it and then bounces off it? You actually land on your feet?

A. No, no I never did hit the ground, I got caught. Something caught up, I don't remember if it was my foot or the, I'm not real sure it happened real quick. And boy next thing you know see the blood on the ground.

Q. And then you actually come to rest now, did you regrab the ladder or what actually stopped you from falling? You hit this thing and it slowed you down, but you never came down actually hit the ground?

[9]

A. Never did actually hit the ground uh. I guess I must have recaught the ladder and that and my legs being caught up in the whole mess. That must have been enough to slow me down.

Q. Okay. You have any idea approximately how far you actually fell before you regrouped?

A. Oh, probably no more than six, seven feet at the most I would think.

Q. Okay. And the Thing that caught up was actually the knee or did you, your foot jam on something?

A. I think it must have been my foot. I must have got caught in the ladder.

Q. And it just jammed the rest of it?

A. Yeah, with my body weight pushing against my knee. Just, just ah theory I don't know for actual positive.

Q. Okay. When you actually stop now you're right down by the stirrup?

A. Yeah, pretty close.

Q. Got your feet back in, you only got maybe another two, three, four feet to come down to get on the ground?

A. Right.

Q. Ah, you get off here, what's hurting you at this point?

A. My knee.

Q. Okay. Do you have any other problems at that point?

A. Ah, immediately right away?

Q. Uh-huh.

A. No, that was my main, I may of had some other aches and pains. But right away the main thing that I knew right off the bat was my knee.

[10]

Q. Okay. Your knee swell up on you or just tender?

A. Oh yeah, oh yeah it was swollen.

Q. The other guys . . .

A. It was swelled up for a couple of weeks.

Q. The other guys come down to you at that point or?

A. Ah, they didn't even see me. They were busy. Then we had, we're kicking cars around there and they didn't, they didn't catch it right off the bat, no.

Q. Okay. Operating with radio or hand signals?

A. I believe it was radios.

Q. Okay. And did you notify them that you were having a problem? Or did you figure . . .

A. Soon, soon after.

Q. Soon after?

A. Real soon after.

Q. Okay. Did they come down with the engine for you then?

A. Yeah We were, we were just finishing up. And then they came down my way real soon after. I let them know right then.

Q. Okay. What they do for you at this point?

A. Took me down to the depot.

Q. Okay. An ah you get down to the depot, made out the PI, called in and tell them you're hurt. Ah they take you over to ah . . .

A. I went directly to the clinic.

Q. Dreyer Clinic?

A. Yeah.

[11]

Q. Okay. Then you stop at Rochelle and get treated there just got back in the car and?

A. Went right to the clinic.

Q. Right out to the clinic, okay. Ah any point up to the time you get out to the clinic you having any other problems or still just ah, just the knee?

A. Uhmmm, I guess a little stiffness, you know. Some body parts, nothing really major. My major thought was on my knee, that was throbbing.

Q. Okay. You say it swelled up almost immediate then?

A. Right.

Q. Okay. Get out to Dryer, they treating you for the knee now or?

A. No. That was for approximately three weeks.

Q. They treated you just for the knee?

A. Yeah.

Q. Anytime during this period ah you have any other problems? You say you had general . . .

A. Stiffness, stiffness in my back and my neck. I kind of expected it to go away. It was something that kind of hung in there. Something like that I thought would take a while to leave.

Q. Uh-huh.

A. And a way it has.

Q. Still having problems with the neck and back?

A. Yeah, a little bit, yeah.

Q. Okay. How's the knee at this point?

A. Good, it seems to be good.

Q. Okay. Did you ever receive treatment down at the clinic for ah the back?

[12]

A. No.

Q. Okay. Who started treatment here with the back?

A. Ah, a chiropractor.

Q. Okay. And you've been seeing him on a regular basis for ah I think they call it manipulations?

A. Something.

Q. They crack the bones and try to realign it and all that good stuff?

A. Yeah, yeah.

Q. One of these days I've got to get out there.

A. They've did a wonderful job, its helped.

Q. It do make you feel better, I know that. When the machine's off I'll tell you about what they did over in the Orient there.

A. Okay.

Q. That definitely helped too. Ah, initially you lost approximately 3 weeks from work?

A. Yes.

Q. Okay. An ah you lost any other time ah other than that?

A. Two other days when I got started with the chiropractor.

Q. Are we talking about the initial period of time ah when you started with the chiropractor, we're talking two more day?

A. Yeah.

Q. Have you had any other losses since that time?

A. Uhmmm, no.

Q. Okay. And ah you say you're still having some problems ah now with the back?

[13]

A. The lower, lower back and neck.

Q. Both of them are still bothering you?

A. Yeah. The back seems to be coming around pretty good. The neck's still, it's not what I would like to see.

Q. Is it a constant type of problem or it come and go some days worse than others?

A. Some days are worse but it, the neck seems to hang in there on a regular basis.

Q. Okay. Ah, we've got the wage loss, and that ah, other than that have you had any other expenses that you paid for out of your pocket?

A. Not that I can think of.

Q. Okay. You say that ah from what you believe happened there was some frost on the car and as you were coming down your, your foot slipped off?

A. Yeah.

Q. Okay. When, when the one foot slipped, everything just wen?

A. Yes.

Q. Okay. Did you notice any frost on the way up there, anything unusual about it?

A. Nothing that really caught my eye. It was, the car was rolling and I wanted to get it stopped. And I just shimmied up the ladder to get . . .

Q. It was coming at you then actually, moving hadn't stopped and . . .

A. Oh yeah.

Q. And you boarded it and climbed up to tie down the brake?

A. That's right.

Q. No problem boarding, no problem climbing up, no problem tying down the brake. Its, the car [14] actually stopped now when you're, you're coming back down?

A. Yes.

Q. Okay. And do you remember which foot slipped?

A. No.

Q. Okay. And we've got ah time of day at approximately ah 10:30 in the morning according to this ah, weather was clear and dry. You remember if the sun was out that day?

A. I believe it was.

Q. Okay. It's just this would have been, like you said, the shade side of the, of the car?

A. Yes.

Q. Okay. Other than what I've asked you here is there anything you can think of you want to add to it Dave?

A. Not that I can think of.

Q. Okay. You still have ah regular appointments with the chiropractor?

A. Yeah, we've, we've cut back now, it's still pretty regular.

Q. Okay. He has helped you?

A. Oh, most definitely.

Q. Okay. With your permission what I'll do is end the

recording then and ah if you want I will rewind it and play it back for you so you can hear it now or like I say when I type it up I'll give you a copy of it. Whichever you want.

A. Oh I think just give me a copy of it, should be okay.

Q. Okay. With your permission then ah I'll turn the machine off?

A. Permission.

[15]

DJR/tb

1/7/91

SUPREME COURT, U.S.
FILED
MAR 18 1993
OFFICE OF THE CLERK

No. 92-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID B. DEUTSCH,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court should grant a Petition for Writ of Certiorari where the United States Court of Appeals for the Seventh Circuit employed the proper standard in reviewing the grant of a motion for summary judgment and where the Court of Appeals fully considered and correctly decided the issues presented by the Petitioner.

2. Whether the United States Court of Appeals for the Seventh Circuit properly affirmed the entry of summary judgment where the petitioner presented no evidence in opposition to the properly framed motion for summary judgment and where the petitioner did not contest the undisputed facts cited in support of the motion for summary judgment but instead chose to rely upon an unverified complaint and arguments in a responsive brief.

LISTING OF ALL PARTIES TO THE PROCEEDING

In addition to the identification in the caption, the respondent in this cause, Burlington Northern Railroad Company, is a wholly-owned subsidiary of Burlington Northern, Inc. Burlington Northern Railroad Company has interests in the following subsidiaries:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The petitioner misrepresents to this Court that the Motion for Publication of the Opinion of the United States Court of Appeals for the Seventh Circuit was by an "ex-parte request by the respondent." The respondent seasonably moved the Court below, with service of the Motion on the petitioner, for publication of the opinion.

CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The Petition for the Writ of Certiorari is not timely and should be dismissed without further proceedings by this Court. As indicated in the petitioner's Appendix (A-11)

the United States Court of Appeals for the Seventh Circuit rendered its opinion on September 21, 1992. On October 7, 1992, petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc. (A-19). In accordance with Rule 13 of the Rules of the United States Supreme Court, the Petition for the Writ of Certiorari was due ninety days after September 21, 1992, not later than December 20, 1992. Rule 13.4 provides that a suggestion made to a United States Court of Appeals for rehearing en banc is not a petition for rehearing which stays the time limit for filing the Petition for a Writ of Certiorari. Petitioner filed his initial Petition on January 19, 1993, thirty days after the expiration of the time limit for filing such a Petition. This Petition was rejected as not in conformance with the Rules and petitioner then filed a subsequent Petition.

Under the plain wording of Rule 13, and even assuming the accuracy of petitioner's statement that the Petition for a Writ of Certiorari was "properly filed" on January 19, 1993, this Petition is thirty days late and should be dismissed as jurisdictionally time-barred.

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure is involved in this Petition, specifically, Rule 56(c) and Rule 56(e), which provide:

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Support and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Also involved in this Petition are Rules 12(m) and 12(n) of the Local Rules for the United States District Court for the Northern District of Illinois which provide:

(m) **Motions for summary judgment; Moving party.** With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure the moving party shall serve and file, in addition to the affidavits (if any) and other materials referred to in Rule 56(e) and a supporting memorandum of law, a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law including a description of the parties and all facts supporting venue and jurisdiction in this Court. That statement shall consist of short numbered para-

graphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion.

(n) **Motions for summary judgment; Opposing party.** Each party opposing a Rule 56 motion shall serve and file, together with opposing affidavits (if any) and other materials referred to in Rule 56(e) and a supporting memorandum of law, a concise response to the movant's statement. That response shall contain (1) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (2) a statement, consisting of short numbered paragraphs, of any additional facts which require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

STATEMENT OF THE CASE

The petitioner's statement of the case does not comply with Rule 14.1(g) of this Court's Rules in that the statements set forth are not material to the issues presented in the Petition for the Writ of Certiorari and also contains misstatements. Accordingly, respondent submits this statement of the case.

The respondent presented its Motion for Summary Judgment, under Federal Rule of Civil Procedure 56, requesting judgment on plaintiff's Complaint, based on the sworn deposition testimony of the plaintiff, and which motion was predicated on a complete lack of negligence by the movant

in the accident in question. (A-22–A-29). The United States District Court for the Northern District of Illinois granted the motion on June 12, 1991 (A-9). The Motion addressed the entire claim made by petitioner in his cause of action. (A-9, A-10). As noted therein, the petitioner presented no evidence when responding to the Motion for Summary Judgment to raise a genuine issue of material fact but instead relied upon the allegations of his unverified Complaint. Following the entry of summary judgment, the petitioner filed an affidavit, in support of his motion under Federal Rule of Civil Procedure 59, which motion was denied by the United States District Court. (A-9–A-10). On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner repeated the arguments made in the court below, and here, including the argument that the parties appeared for argument on the "motion," (an apparent reference to the summary judgment motion) on June 11, 1991 "but no argument was afforded by the District Court." As the Court of Appeals observed, the date of June 11, 1991 was not the date for "argument" on the Motion for Summary Judgment but rather was the date the respondent presented its motion to file a reply to the petitioner's response to the Motion for Summary Judgment. (A-15, A-16). Also, the Court of Appeals rejected petitioner's argument that respondent "amended" its Motion for Summary Judgment and that the petitioner was denied the right of due process to be heard. (A-17).

Lastly, petitioner states that respondent did not "file" the question and answer statement taken of the petitioner and marked as Exhibit 2 at his deposition. Petitioner argues here, as in his unsuccessful Petition for Rehearing with a Suggestion for a Rehearing En Banc to the United States Court of Appeals for the Seventh Circuit, that the respondent is guilty of "fraud" in the matter.

Petitioner states here he did not "discover" this "failure" to file the statement in the record until October 27, 1992.

Petitioner's statement that respondent committed "fraud" is in error for three reasons. First, at the conclusion of petitioner's deposition his attorney, who is also his counsel here, stipulated that the parties would submit, for purposes of the record, only the cover sheets of the exhibits marked at the petitioner's deposition, including Exhibit 2, which remained in the custody of the petitioner's attorney. Accordingly, at all times, petitioner's counsel was well aware that the "entire deposition" consisted of the petitioner's sworn testimony and the cover sheets of the Exhibits. Second, the Federal Rules of Appellate Procedure (FRAP 10 and 11) provide that it is the appellant (the petitioner here), and not the appellee, who is responsible for ensuring that the record on appeal is complete and correct. Third, as observed by the United States District Court and the Seventh Circuit Court of Appeals, the petitioner never presented any affirmative evidence to resist the Motion for Summary Judgment. In resisting the motion petitioner never relied on or referred to the question and answer statement of petitioner.

ARGUMENT

I.

THE PETITION FOR THE WRIT OF CERTIORARI ADVANCES THE SAME ARGUMENTS PETITIONER MADE IN HIS APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WHICH THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED IN ACCORDANCE WITH THE DECISIONS OF THIS COURT.

A. Petitioner's Argument That the United States District Court Allowed Respondent to "Amend" the Motion for Summary Judgment, in Violation of the Federal Rules of Civil Procedure Is Without Basis or Support in the Record.

Petitioner's primary argument in requesting this Court to issue a Writ of Certiorari is that petitioner was denied "due process" because respondent was allowed to "amend" its Motion for Summary Judgment. In support of this contention, petitioner misrepresents the status of the record in the trial court and ignores the analysis of the United States Court of Appeals for the Seventh Circuit.

The Appendix submitted to this Court by the petitioner completely contradicts his argument. Contrary to the bold statements in the Petition, the District Court did not allow "the respondent to amend its motion through a memorandum filed on June 11, 1991." Rather, the District Court allowed respondent to reply to petitioner's response to the Motion for Summary Judgment. In that reply, respondent argued that petitioner had introduced no evidence which raised a genuine issue of material fact concerning the respondent's alleged negligence and that petitioner had mischaracterized the deposition testimony of the petitioner in his response to the summary judgment motion. (A-34 to A-39).

This issue was again raised by the petitioner in his Rule 59 motion where he argued that the trial court had "improperly expanded the Motion for Summary Judgment." (A-9). As articulated by the District Court, there was no misapprehension or confusion in the record that respondent's Motion for Summary Judgment was intended to, and did, encompass all of petitioner's claims and there was no "expansion" or "amendment" of the motion by the reply. (A-9, A-10).

Petitioner's confusion in the court below and his argument in this Petition is based on counsel for petitioner's misunderstanding of the nature of a summary judgment motion. (A-5). As explained to the petitioner by the District Court, the non-moving party must present affirmative evidence to overcome a properly supported motion for summary judgment. (A-5). See *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986), cited by the United States District Court. Petitioner's argument that respondent's reply, which stated that petitioner failed to produce *any* evidence at all to support *any* of his allegations, was in fact an "amendment" to the Motion for Summary Judgment is based on a misunderstanding of *Celotex*. Such a misunderstanding, which continues on the part of petitioner, is not a basis for this Court to grant a Petition for a Writ of Certiorari.

The case law cited by the petitioner does not support his position that respondent violated Federal Rule of Civil Procedure 7(b)(1). In *United States v. Krasnov*, 143 F.Supp. 184 (E.D.Pa. 1956), the District Court held that where, as here, the motion states it is based on Rule 56 of the Federal Rules of Civil Procedure, and the motion articulates the relief sought and the bases for the motion, the "motion is so explicit, [and] the grounds therefore have been set forth with particularity within the mean-

ing of Rule 7(b)(1) of the Federal Rules of Civil Procedure." In *Dunbar v. Triangle Lumber and Supply Company*, 816 F.2d 126 (3rd Cir. 1987), the Third Circuit Court of Appeals held that where a dismissal motion is entertained due to the failure of a litigant's attorney to adhere to the prior orders of the Court, the litigant must be given notice of the hearing. In *Raitt v. Seltzer*, 10 FRD 48 (D.C.N.Y. 1950), the motion in the Federal District Court stated it was "pursuant to the provisions of the Civil Practice Act of the state of New York."; the District Court observed that the misidentification of the provision relied upon was fatally defective to the motion. The aforementioned cases are not applicable to the Petition here.

There is no legal support for petitioner's request for Writ of Certiorari. Petitioner cites a host of inapplicable cases in an effort to persuade this Court that the holdings therein were ignored by the Seventh Circuit Court of Appeals. As an example, in *Morgan v. McDonough*, 689 F.2d 265 (1st Cir. 1982), the motion at issue, unlike respondent's summary judgment motion in the instant case, was unaccompanied by any stated grounds for relief. *Wolgin v. Simon*, 722 F.2d 389 (8th Cir. 1983), merely states that the motion must be made in writing, must state the grounds for the motion and must set forth the relief sought. Respondent's motion for summary judgment adhered to every aspect of these requirements. (A-22-A-29). In *Martinez v. Trainor*, 556 F.2d 818, 819-20 (7th Cir. 1977), the motion in question was expressly a motion to "Amend, Alter, or Vacate the Declaratory Judgment" pursuant to Federal Rule of Civil Procedure 59(e), which the Court of Appeals held would not extend the time for filing the notice of appeal. That decision has no applicability to the issue before this Court. In *Davis v. Hall Engineering*,

Inc., 549 F.2d 314 (5th Cir. 1977), the Court of Appeals merely observed that the motion presented must state with particularity the grounds on which it is based.

Respondent adhered to the requirements of Rule 7(b)(1) of the Federal Rules of Civil Procedure. The Motion for Summary Judgment plainly stated it was based on Rule 56 of the Federal Rules of Civil Procedure, was grounded on petitioner's deposition concerning the facts of the incident, and requested judgment on the Complaint of the petitioner. Not one case cited by petitioner in his Petition for Writ of Certiorari in any way supports petitioner's requested relief.

B. The United States Court of Appeals for the Seventh Circuit Applied the Correct Legal Standard and Properly Decided the Issues Presented by Petitioner.

On appeal, the Court of Appeals for the Seventh Circuit correctly determined that *Celotex*, *supra*, required that petitioner, in responding to a properly supported motion for summary judgment, set forth specific facts or evidence "showing a genuine issue of material fact existed. . ." The Court of Appeals, also citing *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613 (7th Cir. 1989), properly held that petitioner failed to introduce any such evidence. (A-14, A-15).

As to the alleged violation of petitioner's "due process" rights, the Court of Appeals noted that there was "some confusion in Deutsch's [petitioner's] briefs as to whether he is also claiming he was denied the opportunity to be heard as to Burlington Northern's motion for summary judgment." (A-16). In the Petition for Writ of Certiorari, petitioner implies that the Motion for Summary Judgment was scheduled for oral argument on June 11, 1991. However, the Court of Appeals correctly noted that no oral

argument was ever scheduled and the record did not reflect that petitioner ever requested oral argument. The Court of Appeals further noted that June 11, 1991 was merely the date respondent moved to submit its reply. In fact, as respects petitioner's argument that the Motion for Summary Judgment was "expanded" or "amended in the reply," the Court of Appeals specifically found that the initial Motion for Summary Judgment by respondent was sufficient to encompass all of the petitioner's claims, irrespective of the reply, and it was unnecessary to resolve the issue of the "procedural sequence of events surrounding" the respondent's reply. (A-17).

Petitioner argues that the essence of "due process" is fundamental fairness, citing *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), where the petitioner argued she was denied assistance of counsel in violation of due process, as guaranteed by the Fourteenth Amendment of the United States Constitution. This opinion, and all others cited by petitioner on the issue of "due process," contains general statements of law, but none has any application on the issue presented to this Court, i.e., whether petitioner was denied "due process" in the proceedings on the Motion for Summary Judgment. Petitioner's response to that motion was comprised solely of an ad hominem attack on respondent's counsel and an unacceptable misstatement of the critical legal principles. Now, in an effort to trigger this Court's review of the well-considered opinions of the courts below, petitioner argues that this Court should exercise its "supervisory powers" to correct a deprivation of "due process" caused by a suggested denial of a right to respond. As correctly observed by the Seventh Circuit Court of Appeals, there is no requirement of a hearing for oral argument on summary judgment motions, and petitioner did

not request such an argument. As to a written response, as both the District Court and the Seventh Circuit Court of Appeals observed, petitioner did have ample opportunity to contest the Statement of Undisputed Facts filed by the respondent, in accordance with Local Rules 12(m) and 12(n) of the United States District Court for the Northern District of Illinois (in the absence of which response such facts are deemed admitted) and more than ample opportunity to appropriately resist respondent's Motion for Summary Judgment. (A-2, 3, 9, 10, 14, 15, 16). Petitioner's failure to appreciate this Court's holding in *Celotex*, and subsequent opinions dealing with summary judgment motions, does not amount to a denial of due process as petitioner suggests.

II.

PETITIONER'S ARGUMENT HERE THAT RESPONDENT COMMITTED A "FRAUD" UPON THE COURTS BELOW IS A PATENT MISREPRESENTATION TO THIS COURT.

Petitioner argues that the courts below were "deprived" of a critical document in ruling on the Motion for Summary Judgment and the appellate review of the District Court's action. What petitioner does not reveal to this Court is that petitioner never referred to this document, cited the document, or otherwise relied upon the document in resisting respondent's Motion for Summary Judgment or in appealing the grant of same. Instead, following the disposition of the appeal, petitioner, in his Motion to Reconsider, argued that respondent committed a "fraud" in failing to include the statement in the record on appeal.

As seen by Appendix K1, it was counsel for petitioner who announced at the termination of the deposition of petitioner that the parties had stipulated that the exhibits

to the deposition transcript would consist of the "first page" only, which inclusion with the deposition transcript would suffice for purposes of the record, and that counsel for petitioner would maintain custody of Exhibit 2. When respondent filed the "entire" deposition transcript (excerpts were attached to the motion) it was simply following the requirements of the Federal Rules of Civil Procedure and the stipulation as to the record of the deposition, entered by the parties. Second, it was the petitioner, the appellant below, who had the responsibility to correct any deficiencies in the record on appeal. Third, petitioner did not contest respondent's statement of uncontested facts which were set forth in the summary judgment motion, nor did petitioner submit any evidentiary materials in opposition to the motion. Petitioner never referred to the question and answer statement until after the Court of Appeals rendered its opinion.

Petitioner wrongly argues that the District Court, and reviewing court, have an obligation to extensively search the record for "material facts." Petitioner, in responding to the motion for summary judgment and appealing the grant of same, never considered any facts to be sufficiently "material" to bring them to the attention of the District Court, or the Court of Appeals. Now, even in this Petition, petitioner does not recite any "material facts" purportedly contained in the question and answer statement. Nor does petitioner explain how the District Court or the Court of Appeals erred in failing to consider the question and answer statement which never served as a basis for petitioner's resistance to respondent's Motion for Summary Judgment. As the District Court and the Court of Appeals both noted, petitioner simply did not understand his responsibility in responding to a properly supported motion for summary judgment.

CONCLUSION

A review of the opinions of the United States District Court and the United States Court of Appeals for the Seventh Circuit demonstrates that any complaint petitioner has is with the law as articulated by the United States Supreme Court in *Celotex*, *supra*, and not with an absence of appropriate "notice" or with a deprivation of due process. The petitioner has advanced no supportable basis for this Court's issuance of a writ of certiorari. Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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APPENDIX K1

* * * * *

the original signature page and I will get it taken care of.

THE NOTARY: Will do.

(The document was thereupon marked Deutsch Deposition Exhibit No. 4 for identification as of March 14, 1991.)

MR. SCHUM: Why don't you show on the record then that Exhibits 1 through 4 remain in the custody of the attorney for the Plaintiff and Exhibit 4 will remain in the cutody of Mr. Newell as attorney for the railroad and that the cover sheets shall suffice for purposes of the original deposition record to designate what those exhibits were.

AND FURTHER DEPONENT SAITH NOT